

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
)	
CHAMBERLAIN & MCCREERY, INC.)	
)	
)	
RESPONDENT)	CASE NO. WPC08-0012

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, Director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed Director of the Tennessee Division of Water Pollution Control (hereinafter the "director" and the "division" respectively) by the Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "commissioner" and the "department" respectively).

II.

Chamberlain & McCreery, Inc., (hereinafter the "Respondent") is a corporation licensed to conduct business in the state of Tennessee. The Respondent is the owner of two residential developments known as The Villages at Whiteoaks (hereinafter "site A, Phases 1 and 2") located off of Harrell Road and Kensington Planned Development

(hereinafter “site B”) located off of Forrest Street, both in Shelby County, Tennessee. Service of process may be made on the Respondent through Jon McCreery, Registered Agent, at 8195 Dexter Road, Cordova, Tennessee, 38016.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. §69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the “Rule”). Pursuant to T.C.A. §69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a “person” as defined at T.C.A. §69-3-103(20) and, as hereinafter stated, the Respondent has violated the Act.

V.

The Loosahatchie River and its unnamed tributaries are referred to herein, as “waters of the state” as defined by T.C.A. §69-3-103(33). Pursuant to T.C.A. §69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. In accordance with Department Rule 1200-4-4, “Use Classifications for Surface Waters,” The Loosahatchie River and its unnamed tributaries have been classified for the following uses: Fish and Aquatic Life, Recreation, Irrigation, and Livestock Watering and Wildlife. In addition, the Loosahatchie River has been classified for use as a Domestic and Industrial Water Supply.

VI.

Tennessee Code Annotated §69-3-108 requires a person to obtain coverage under a permit prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substances will move into waters of the state. Coverage under the Tennessee Construction General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the “TNCGP”) may be obtained by submittal of a Notice of Intent (NOI), site-specific Storm Water Pollution Prevention Plan (SWPPP), and appropriate fee.

Pursuant to T.C.A. §69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a §401 Water Quality Certification. No activity may be authorized unless any lost resource value associated

with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

FACTS

VII.

On July 11, 2006, the Respondent submitted a NOI, SWPPP, and application fee to the Memphis Environmental Field Office (M-EFO), requesting coverage under the TNCGP for construction activities at Phase 1 of site A. The division issued coverage on August 29, 2006, under the tracking number TNR152093.

VIII.

On October 12, 2006, the Respondent submitted a NOI, SWPPP, and application fee to the M-EFO, requesting coverage under the TNCGP for construction activities at Phase 2 of site A. The division issued coverage on November 13, 2006, under the tracking number TNR152226.

IX.

On May 4, 2007, the Respondent submitted a NOI, SWPPP, and application fee to the M-EFO, requesting coverage under the TNCGP for construction activities at site B. The division issued coverage on May 15, 2007, under the tracking number TNR152510.

X.

On May 4, 2007, the Respondent submitted an application to obtain authorization under an ARAP for a minor road crossing. On May 7, 2007, the division issued authorization for construction of the minor road crossings.

XI.

On June 20, 2007, division personnel conducted an inspection at site B and observed that the Notice of Coverage (NOC) was not posted on the site. In addition, division personnel observed that Erosion Prevention and Sediment Control measures (EPSC) at the site were improperly installed and maintained, resulting in a discharge of sediment off site.

XII.

On June 29, 2007, the division issued a Notice of Violation (NOV) to the Respondent for violations observed during the June 20, 2007, site visit. The NOV required the Respondent to immediately install and maintain EPSC measures so that additional sediment would not be allowed to leave the site. The NOV also required the Respondent to immediately stabilize any at-grade areas with appropriate vegetation or other measures. Furthermore, the NOV required the Respondent to submit a written response on or before July 15, 2007, describing the actions taken to prevent future sediment discharge.

XIII.

On November 27, 2007, division personnel conducted a compliance inspection at site A and observed that Erosion Prevention and Sediment Control measures (EPSC) had not been properly installed or maintained in both Phase 1 and 2 of the development. The failing or inadequate EPSC measures allowed sediment to discharge from Phase 1 of site A into the headwaters of an unnamed tributary of the Loosahatchie River along the western site border. The failing or inadequate EPSC measures in Phase 2 of site A allowed sediment to discharge into the same unnamed tributary resulting in a condition of pollution. Additionally, division personnel observed that EPSC measures were not in accordance with the SWPPP in both Phase 1 and 2 of the development. Furthermore, division personnel observed in Phase 2 of the development failing EPSC measures around the permitted road crossing, which was in violation of the existing ARAP.

Division personnel also conducted an inspection on the adjacent site B on the same day. It was noted that EPSC measures had not been properly installed or maintained at the site. The failing and inadequate EPSC measures had allowed sediment to migrate off site and enter the unnamed tributary of the Loosahatchie River east of site B causing a condition of pollution.

XIV.

On December 26, 2007, the division issued a Notice of Violation (NOV) to the Respondent for the violations noted during the November 27, 2007, inspection at site B. In the NOV, the division required the Respondent to immediately stabilize any at-grade

areas with appropriate vegetation or other stabilization measures. The division also required the Respondent to immediately install and maintain appropriate EPSC measures to prevent further release of sediment off site. As well, the division required the Respondent to submit inspection reports dating back to May 2007 for the site. Finally, the division required a written response on or before January 18, 2008, describing actions taken to prevent future sediment discharge.

XV.

On January 4, 2008, the division issued a Notice of Violation (NOV) to the Respondent for the violations noted during the November 27, 2007 inspection at site A (phase 1 and 2). In the NOV, the division required the Respondent to immediately stabilize any at-grade areas with appropriate vegetation or other stabilization measures. The division also required stabilization to any modifications of the streambank of the unnamed tributary to the Loosahatchie River and compliance with the terms and conditions of the general permit for intake and outfall structures. As well, the division required the Respondent to submit inspection reports dating back to September 2006 for Phase 1 and November 2006 for Phase 2. Furthermore, the division required installation and maintenance of EPSC measures to prevent additional sediment from leaving the site. Finally, the division required a written response on or before January 18, 2008, describing actions taken to prevent future sediment discharge.

VIOLATIONS

XVI.

By failing to comply with the terms of an ARAP and by failing to comply with terms and conditions of the TNCGP as described herein, the Respondent has violated T.C.A. §§69-3-108(a) and (b) and 69-3-114(b), which state:

T.C.A. §69-3-108:

(b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

T.C.A. §69-3-114 (b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XVII.

By discharging sediment into waters of the state that resulted in a condition of pollution, the Respondent has violated T.C.A. §§69-3-114(a), referenced below, and 69-3-114(b), as referenced above.

T.C.A. §69-3-114(a):

It shall be unlawful for any person to discharge any substance into waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XVIII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§69-3-107, 69-3-109, 69-3-115, and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER and ASSESSMENT to the Respondent:

1. The Respondent shall immediately implement appropriate EPSC measures to ensure that no eroded material leaves either site and enters waters of the state. Documentation that EPSC measures have been implemented is to be sent within

THIRTY (30) DAYS of receipt of this Order and Assessment to the manager of the Division of Water Pollution Control located at the M-EFO at Suite E-645 Perimeter Park 2510 Mount Moriah Road, Memphis, Tennessee, 38115-1520.

2. The Respondent shall maintain EPSC measures as needed to retain sediment on site until final site stabilization or until no longer an operator at the both sites.
3. The Respondent shall submit inspection reports to the M-EFO dating back to September 2006 for Phase 1 of site A of the development and November 2006 for Phase 2 of site A and to May 2007 for site B within THIRTY (30) DAYS of receipt of this Order and Assessment to the M-EFO.
4. The Respondent is hereby assessed a CIVIL PENALTY in the amount of TEN THOUSAND FIVE HUNDRED DOLLARS (\$10,500.00).
 - a. The Respondent shall pay FOUR THOUSAND DOLLARS (\$4,000.00) to the division within THIRTY (30) DAYS of receipt of this Order.
 - b. The Respondent shall pay TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 1 above in a timely manner.
 - c. The Respondent shall pay TWO THOUSAND DOLLARS (\$2,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 2 above in a timely manner.
 - d. The Respondent shall pay TWO THOUSAND DOLLARS (\$2,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 3 above in a timely manner.

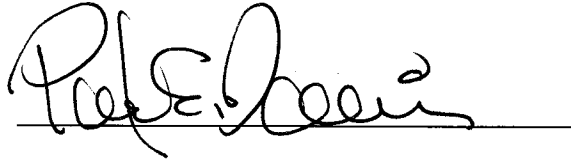
5. The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this Order and Assessment. In order to be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension will be in writing. Any such extension by the division shall be in writing. Should the respondent fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondent is advised that the foregoing Order is in no way to be construed as a waiver, expressed or implied, of any provision of law or regulations. However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

The director will reply to the Respondent's request in writing. Should the Respondent fail to meet the requirement by the extended date, any associated CIVIL PENALTY shall become due THIRTY (30) DAYS thereafter.

Issued by the Director of the Division of Water Pollution Control on behalf of the
Commissioner of the Tennessee Department of Environment and Conservation on this
21st day of February, 2008.

A handwritten signature in black ink, appearing to read "Paul E. Davis", is written over a horizontal line.

Paul E. Davis, P.E.
Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§69-3-109, 115, allows any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel (OGC) a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within THIRTY (30) DAYS of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within THIRTY (30) DAYS of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. §4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible

for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payments of the civil penalty shall be made payable to the “Treasurer, State of Tennessee,” and sent to the Division of Fiscal Services-Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L&C Tower, 401 Church Street, Nashville, Tennessee 37243. All other correspondence regarding this matter should be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, at 6th Floor L & C Annex, 401 Church Street, Nashville, Tennessee 37243-1534. Please write your case number on all payments and all correspondence concerning this matter.